

IN THE SUPREME COURT OF MISSOURI

Supreme Court No. SC85792

Circuit Court Cause No. JU301-0048-J10

Court of Appeals No. E.D. 82703

In the Interest of A.S.W.

SUBSTITUTE BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Cases and Statutory Authority	3
Jurisdictional Statement	4
Statement of Facts	5-15
Points Relied On	16-17
Argument-Point #1	18-34
Argument-Point #2	35-38
Conclusion and Relief Sought	39
Certificate of Compliance	41

TABLE OF CASES, STATUTES AND OTHER AUTHORITY

Mo. Const. art. V, §10, pg. 4, 16,

Mo. Const. art. I, §2, pg. 4, 16,

Mo. Rev. Stat §211.447.4 (3) (1998) pg. 16, 17, 18, 19, 21, 38

In re A.S.O., 52 S.W. 3d 59 (Mo. App. W.D. 2001) pg. 17, 32, 37

In Re Adoption of W.B.L., 681 S.W.2d, 452, 454 (Mo. banc 1984) pg. 16, 17,
20, 34, 37,

In the Interest of C.P.B., 641 S.W.2d 456, 460 (Mo.App.1982) pg. 30,

In the Interest of D.L.M., 31 S.W. 3d 64 (Mo. App. E.D. 2000) pg 16, 19, 20,
30, 32, 33, 34, 36, 37,

In the Interest of F.N.M., 951 S.W.2d 702, 703 (Mo.App. E.D.1997) pg. 16,
19, 36

Santosky v. Kramer, 455 U.S. 745, 753 (1982) pg. 16, 32

In re T.A.S., 32 S.W. 3d 804 (Mo. App. W.D. 2000). pg. 21

JURISDICTIONAL STATEMENT

This is an appeal of a decision in a Termination of Parental Rights proceeding by a Circuit Judge in Jefferson County, Missouri.

This case was transferred to this Court from the Missouri Court of Appeals for the Eastern District of Missouri under its Order of February 24, 2004 pursuant to Mo. Const., art. V, §10.

This case involves an Appellate Court of this State making a decision contrary to an existing decision from that same court; and the deprivation of a natural parent's fundamental liberty interest under Mo. Const., art. I, §2.

This Court having the authority under Mo. Const. art. V, §10 to finally determine all causes coming to it from the court of appeals, whether by certification, transfer, or certiorari, has jurisdiction to hear and determine this cause.

STATEMENT OF FACTS

Paul Stephen Warren (hereinafter Father) is the biological father of Alex Stephen Warren (hereinafter A.S.W.) born February 16, 1998. Father was married to Judith Ann Warren (hereinafter Mother) on February 15, 1997(Tr. 10). Father was the primary caregiver to A.S.W. from the time of his birth to January 11, 2000 (Tr. 100-102).

Father sustained a head injury at work on January 11, 2000 when a ladder slipped causing him to fall (Tr. 83-84). Subsequent to Father's head injury, Father spent time in the hospital, and on March 14, 2000 after being stabilized, Father was transferred into the care of Restcare (hereinafter RESCARE) for outpatient occupational therapy, physical therapy and speech therapy (Tr. 15-17).

On or about May 21, 2001, the Division of Family Services assumed the custody of A.S.W. because Mother was incoherent, intoxicated, and unaware of the juvenile's whereabouts and had failed to supervise the juvenile appropriately or provide for his cleanliness. Father was found to be disabled and unable to care for the juvenile on May 21, 2001 (L.F. 106-111).

Father had supervised visits with A.S.W. until February 2002 when he was accused of inappropriate conduct when, after requested by the child, he

showered with his son after they were playing and got dirty (Tr. 102). The caseworker for DFS testified that in regard to the shower incident, that the child made no statements of any inappropriate contact by Father during the shower (Tr. 67). Father testified that when he took care of the child before that he would take showers with him. Father further testified that he did not touch the private areas of the child during the shower (Tr. 103). During the shower, Father's mother was standing right outside the door (Tr. 103). Moreover, Alex was laughing during the shower and the entire event lasted 2-3 minutes (Tr. 159).

During his visits with A.S.W. the caseworker for the Division of Family Services testified that Father's conduct with A.S.W. during the visits was appropriate, that Father showed concern and love for the child, that Father redirected the child if the child exhibited inappropriate behavior, that Father maintained regular contact with DFS, Father paid child support, and that Father was following the advice of his doctor (Tr. 65-67).

On or about March 13, 2002, the Juvenile Officer sought termination of Father's rights pursuant to Mo. Rev. Stat. §211.447.4 (1998) alleging the following to wit: The child has been under the jurisdiction of the juvenile court for a period of one year or longer and the conditions which led the assumption of jurisdiction still persist, or conditions of a potentially harmful

nature continue to exist, and there is little likelihood that these conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home to wit, *the father has a significant brain injury which renders him incapable of providing the necessary care, custody and control of the juvenile (the remainder of the Count was stricken by stipulation)*-Emphasis added (L.F. 73-75).

In June of 2002, Father was released from RESCARE to the supervision of his sister Donna as Father needed no further direct supervision, only intermittent supervision (Tr. 21, 29). As of his discharge, the RESCARE witness testified that Father had improved considerably (Tr. 30-31). As of the date of trial, October 22, 2002, the RESCARE witness testified that other than stopping in to say hello to Father, RESCARE had no physical contact with Father (Tr. 29). After Father's discharge, RESCARE did not come out to his home to see him (Tr. 29). The RESCARE witness further testified that Father had progressed to the point of intermittent supervision which meant not that someone have to be with Father 24 hours a day just that someone would need to be available to oversee his care. Father's mother testified that they or other family members would be

available to oversee the care and be a phone call away if necessary (Tr. 30, 36 157).

The RESCARE witness further testified that Father had improved in the areas of problem solving, money management, and physical balance. Moreover, the witness testified that Father did remarkably well (Tr. 20-21).

Father submitted to a psychological evaluation by Dr. Powers on August 29, 2002. Dr. Powers' report was entered into evidence at trial (L. F. 95-99). Dr. Powers performed a series of tests on Father. Dr. Powers conducted an Intellectual Assessment of Father and he scored in the low average range with an IQ of 81. (L.F. 95-99). Father's GAF (Global Assessment for Functioning) score was 55 which indicated only a moderate level of psychological difficulty. Dr. Powers noted in his report that Father was able to recognize essential visual details and was clearly in the average range. Father's ability to understand social implications on the basis of visual cues and his ability to see part-whole relationships in meaningful material were in the low average range. Dr. Powers found that Father's ability to concentrate was good and his short term auditory memory and his ability to form abstract verbal concepts were at the lower end of the average range. Dr. Powers noted that Mr. Warren's facial movements gave the impression of greater cognitive deficits than were indicated by the testing

results. The testing was not indicative of significant deficits in any area. While Dr. Powers found that Father had indeed experienced cognitive impairments as the result of his fall those deficits were not severe or incapacitating. Dr. Powers believed that Father's psychological resources were within acceptable limits. ***Dr. Powers found that Father was able to adequately parent if provided guidance and assistance.*** Dr. Powers also found that Father's visitations with his son were appropriate. Moreover, Dr. Powers found that Father's interest in his son was sincere and that he wanted to play an active role in his son's life (L.F 95-99).

Dr. Powers found no inappropriate sexual references in Father's personality assessment. There was no indication that he was preoccupied with sexual ideation. There was no indication, states Powers, that his (Father's) interest in his son was prompted by sexual urges or desires (Tr. 44-45).

Shirley Smith, offered by the Juvenile Officer to testify in regard to Father's brain injury was not qualified to render medical opinions, and her testimony in regard to the same should be given little if any weight. At the time of trial, Ms. Smith was "...***in the process*** of receiving my (her) certification in brain injury specialist and clinical instructor. Ms. Smith was

a certified occupational therapy assistant. Ms. Smith had an associate's degree in occupational therapy (Tr. 13).

Father successfully completed a parenting class. Father successfully learned about nutrition, problem solving, role modeling, and child safety.

The Social Worker for the State of Missouri stated that "...Paul was cooperative and attentive throughout the sessions, interacted well, and has shown interest in the topics presented...and has been a pleasant cooperative participant and has been a great asset to the group. Great job, Paul."

(L.F.100-105)

Father testified that as of the date of trial he was living with his sister. Father would be left alone in the residence for up to 12 hours (Tr. 81).

During those periods Father would clean, do the laundry, and feed the dog (Tr. 82). Father does the grocery shopping buying meats, vegetables, fruit milk and canned goods with no assistance from his sister (Tr. 82). Father would make the decisions as to what food to buy, when to go, and making a list (Tr. 83). As of trial, Father was not seeing a doctor other than for checkups every six months (Tr. 84).

At trial, Father was asked numerous questions about his ability to properly care for Alex. Father's responses were appropriate as evidenced by the following testimony to wit:

Attorney Bryan-What would you do if a child had a fever?

Father-I would take him to a doctor.

Attorney Bryan-What would you do if the child had a fever of say 104?

Father-I would take him to the hospital (Tr. 93)

Attorney Bryan-What would you do if the child had a cut on his hand?

Father-Well, I would use peroxide and bandage it up if it wasn't severe,
but if it was severe I would take him to the hospital, too. (Tr.
93-94).

Attorney Bryan-If the child came into your care right now, where would
the child go to school? Do you know?

Father-Yes, He would go to school at Winfield.

Attorney Bryan-How would he get there?

Father-How would he get there? There are buses that pick them up in the
trailer court. They stop at each trailer and pick up the child.

Attorney Bryan-And how would you get child get to the bus?

Father-Right there in front of the house, and I would stand in front of the
hours with him until he was picked up (Tr. 94).

Attorney Bryan-How would you find out about shots the child would
need?

Father-I would talk to the doctor (Tr. 95-96).

Attorney Bryan-Did you bring anything for the child when you visited with him?

Father-Yes, I did. I always brought Alex food, and I also brought him toys when he was a little bit younger; and, plus, I've brought him toys recently. But I've bought him new blue jeans, new shoes, new shirts, bought him an electric toothbrush and let him take it with him. I just wanted to keep him happy and keep him clothed (Tr. 98-99).

Attorney Bryan-Would you describe—well, when did you start caring for the child?

Father-I started caring for him after he was brought home from the hospital when he was born. And naturally, you know, we had raised him on the proper medicine, on the proper nutrition that he needed, like formula, to help him grow and give him the strength to help him build himself where he could, you know, just function on his own...When he grew up and learning to walk, put him in a walker and then let him walk.

And then he got out of the walker and would hold my hands, he wanted to walk, and he'd just say, "Daddy, I want to walk like you." And so I would. Well, he said "Da-da" back then. And he'd—then he would—he would want to hang on to me and hang on to me when I'd try to leave.

When I tried to leave, he would just grab ahold of my pants leg.

If he was crawling, he would even grab ahold of my shoestrings...(Tr. 100-101)

Attorney Bryan-Do you think you can care for your child?

Father-Yes, I do.

Attorney Bryan-You're talking about cooking. What can you cook?

Father-I can –pork chops, macaroni and cheese, potatoes, fried or mashed potatoes, or I can bake potatoes, or hamburgers, toast, soup.

And every kind of food that we enjoy I could cook (Tr. 109).

At trial it was established that Father in essence took care of his sister (with whom he was living) which included waking her up, preparing breakfast, cooking dinner, doing the laundry (Tr. 107-109). It was further established that Father had successfully taken and passed a driver's examination and held a valid Missouri driver's license (Tr. 111-112).

Moreover, according to his sister, Father was able to successfully care for sister's disabled husband and that care included dressing him, bathing him, putting shoes on him; and otherwise taking care of him like a baby (Tr. 150-152).

Mother did not respond to the Petition nor appear at trial and her rights were terminated by default.

On November 19, 2002, the trial court terminated Father's parental rights. The trial court found that Father had a mental condition, cognitive disorder, that was permanent and or that there was no reasonable likelihood that it could be reversed rendering Father unable to knowingly provide Alex the necessary care, custody and control. In support of this finding the court said that 1)There is no record of any service agreement being approved by the court in this cause; 2)The Division offered a psychological evaluation and parenting classes to the father, but in view of his mental condition, such efforts have been unsuccessful in reuniting the child with the father; 3)The father does suffer from a mental condition which is permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the father unable to knowingly provide the child the necessary care, custody and control; and 4)There is no evidence that either parent suffers from any chemical dependency which prevents the parent from consistently providing the necessary care, custody and control over the child and which cannot be treated so as to enable the parent to consistently provide such care, custody and control (L.F. 106-111).

That on or about December 12, 2002, Father filed his *Motion for New Trial or in the Alternative to Amend Judgment and Order Terminating Parental Rights as to Father* (L.F.112-123). Said Motion for New Trial

was denied on March 4, 2003 (L.F. 146). An appeal to the Missouri Court of Appeals for the Eastern District followed. The Missouri Court of Appeals affirmed the trial Court with an unpublished opinion.

An application to this Court followed.

POINTS RELIED ON

POINT #1-. The trial court erred because its Judgment and Order Terminating Parental Rights (as to Father) was against the weight of the evidence because there was insufficient evidence presented to support a finding by clear, cogent and convincing evidence that grounds for termination existed under Mo. Rev. Stat. §211.447.4 (3) (1998) in that the conditions that led to the assumption of jurisdiction no longer persisted as to Father and that Father's condition had improved to the point that A.S.W. could be returned to his Father's custody and Father could immediately provide A.S.W. with a stable and permanent home.

Mo. Rev. Stat. §211.447.4 (3) (1998)

Mo. Const. art. I, Section 2

Mo. Const. art. V, Section 10

Santosky v. Kramer, 455 U.S. 745, 753 (1982)

In Re Adoption of W.B.L., 681 S.W.2d, 452, 454 (Mo. banc 1984)

In the Interest of D.L.M., 31 S.W. 3d 64 (Mo. App. E.D. 2000)

In the Interest of F.N.M., 951 S.W.2d 702, 703 (Mo.App. E.D.1997)

POINT #2-The trial court erred because its Judgment and Order Terminating Parental Rights (as to Father) misapplied Missouri law when it terminated Father's parental rights based on his brain injury because there is no statutory authority for a Court to terminate parental rights based on a physical injury pursuant to Mo. Rev. Stat §211.447.4 (3) (1998).

Mo. Rev. Stat §211.447.4 (3) (1998)

In re A.S.O., 52 S.W. 3d 59 (Mo. App. W.D. 2001).

In the Interest of F.N.M., 951 S.W.2d 702, 703 (Mo.App. E.D.1997);

In the Interest of D.L.M., 31 S.W. 3d 64 (Mo. App. E.D. 2000).

Adoption of W.B.L., 681 S.W.2d, 452, 454 (Mo. banc 1984)

ARGUMENT-POINT #1

The Appellant challenges the Judgment and Order of Termination of Father's Parental Rights entered by the Honorable Carol Kennedy Bader on November 19, 2002.

POINT #1 The trial court erred because its Judgment and Order Terminating Parental Rights (as to Father) was against the weight of the evidence because there was insufficient evidence presented to support a finding by clear, cogent and convincing evidence that grounds for termination existed under Mo. Rev. Stat §211.447.4 (3) (1998) in that the conditions that led to the assumption of jurisdiction no longer persisted as to Father and that Father's condition had improved to the point that A.S.W. could be returned to his Father's custody and Father could immediately provide A.S.W. with a stable and permanent home.

Standard of Review

In a termination of parental rights proceeding, the judgment of the trial court shall be affirmed unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies

the law. *In the Interest of F.N.M.*, 951 S.W.2d 702, 703 (Mo.App. E.D.1997); *In the Interest of D.L.M.*, 31 S.W. 3d 64 (Mo. App. E.D. 2000).

This court defers to the trial court's assessment of the credibility of the witnesses and examines all facts in the light most favorable to the trial court's judgment. *Id.*

Mo. Rev. Stat §211.447.4(3) (1998) provides justification for termination when *"the child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home."* In making its determination, the trial court is to consider and make findings on four factors pursuant to 211.447.4 (3), namely: (a) *the extent to which the parent has complied with any service plan or plans entered into;* (b) *the success or failure of the efforts of any agency, division, or officer, to aid the parent on a continuing basis in adjusting his or her circumstances or conduct in order to provide a proper home for the child;* (c) ***a mental condition shown to be permanent***

or such that there is no reasonable likelihood of its reversal and which renders the parent unable to knowingly provide the child with necessary care; and (d) any chemical dependency preventing the parent from consistently providing the child with necessary care, custody and control and which cannot be treated to enable the parent to consistently provide such care, custody and control”

Prior to terminating the rights of a parent, there must be clear, cogent, and convincing evidence that one or more of the grounds set forth in RSMo. §211.447.4(3) exists. *Id.* at 705. Although reunification of the family is the desired outcome of DFS involvement, the primary concern in any termination case is the best interest of the child. *Id.* at 706. Such clear, cogent, and convincing evidence must instantly tilt the scale in the affirmative when weighed against the evidence in opposition and leave the fact finder's mind with an abiding conviction that the evidence is true. *In Re Adoption of W.B.L.*, 681 S.W.2d, 452, 454 (Mo. banc 1984). ***The statutes are to be strictly construed in favor of the natural parents.*** *Id.* at 455 (Emphasis Added).

The Court of Appeals may reach issue of the best interests of the child only after it has made a determination that one or more of the statutory

grounds for termination of parental rights exist. In re T.A.S., 32 S.W. 3d 804 (Mo. App. W.D. 2000).

The trial court's findings under *Mo.Rev. Stat §211.447.4 (3)(a-d)(1998)* are not supported by substantial evidence, and indeed, are wholly against the weight of the evidence, and therefore, termination of Father's parental rights is not justified.

The trial court found that Father had a mental condition, cognitive disorder, that was permanent and or that there was no reasonable likelihood that it could be reversed rendering Father unable to knowingly provide Alex the necessary care, custody and control (L.F 106-111). In support of this finding the court said that 1)There is no record of any service agreement being approved by the court in this cause; 2)The Division offered a psychological evaluation and parenting classes to the father, but in view of his mental condition, such efforts have been unsuccessful in reuniting the child with the father; 3)The father does suffer from a mental condition which is permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the father unable to knowingly provide the child the necessary care, custody and control; and 4)There is no evidence that either parent suffers from any chemical dependency which prevents the parent from consistently providing the necessary care, custody and control

over the child and which cannot be treated so as to enable the parent to consistently provide such care, custody and control (L.F. 106-111).

While the trial court concludes that there was no service agreement approved by the court, there is no dispute that Father complied with all directives given to him by the Division of Family Services, the court and the Juvenile Officer. *The non-compliance portion of the Juvenile Officer's Petition was stricken by consent (Tr. 9-10).*

There is no support to the court's finding that The Division offered a psychological evaluation and parenting classes to the father, but in view of his mental condition, such efforts have been unsuccessful in reuniting the child with the father. There is a mountain of evidence to show that Father was at a minimum making substantial progress towards reunification with his son. During his visits with A.S.W. the caseworker for the Division of Family Services testified that Father's conduct with A.S.W. during the visits was appropriate, that Father showed concern and love for the child, that Father redirected the child if the child exhibited inappropriate behavior, that Father maintained regular contact with DFS, Father paid child support, and that Father was following the advice of his doctor (Tr. 65-67). Moreover, Father successfully completed a parenting class. Father successfully learned about nutrition, problem solving, role modeling, and child safety. The

Social Worker for the State of Missouri stated that ...”Paul was cooperative and attentive throughout the sessions, interacted well, and has shown interest in the topics presented...and has been a pleasant cooperative participant and has been a great asset to the group. Great job, Paul.” (L.F. 100-105).

There is further no support that Father was suffering from a permanent condition that had no reasonable likelihood of reversal that rendered him unable to provide the A.S.W. the necessary care, custody and control. The critical analysis is whether there was support for the court’s finding that Father’s condition was one where there was no reasonable likelihood of reversal; and 2)whether that condition rendered Father unable to knowingly provide the necessary care, custody and control of this son. There was no credible support for these findings. The record is absolutely clear that Father’s condition had improved to the extent that he was released from care; and further, that all Father’s testing as to cognitive ability was normal (albeit in the lower average range). Moreover, the record is also clear that Father was able to provide care to his son.

The Juvenile Officer first put on Shirley Smith (RESCARE witness) to show that Father suffered from a mental condition that rendered him unable to care for his son. Although there was no objection from trial counsel as to Ms. Smith’s testimony, there should be little doubt that she

lacked the education, experience and certification to render an opinion about Father's cognitive abilities and or his mental capacity. Ms. Smith was ..."*in the process*" of receiving her certification in "brain injury specialist and clinical instructor." **Ms. Smith was a merely a certified occupational therapy assistant.** Ms. Smith merely had an associate's degree in occupational therapy (Tr. 13).

Ms. Smith did offer valuable evidence as to Father's status with that organization. In June of 2002 Father was released from RESCARE to the supervision of his sister Donna as Father needed no further direct supervision, only intermittent supervision (Tr. 21, 29). As of his discharge, the RESCARE witness testified that Father had improved considerably (Tr. 30-31). As of the date of trial, October 22, 2002, the RESCARE witness testified that other than stopping in to say hello to Father, RESCARE had no physical contact with Father (Tr. 29). After Father's discharge, RESCARE did not come out to his home to see him (Tr. 29). The RESCARE witness further testified that Father had progressed to the point of intermittent supervision which did not mean that Father needed constant oversight, just that someone needed to check in on him (Tr. 30, 36, 157).

Next, The Juvenile Officer called Dr. James Powers, a psychologist. Again, there was no objection from trial counsel and to a non-medical doctor

offering testimony about a brain condition. As with Ms. Smith, Dr. Powers' testimony in regard to Father's cognitive or mental conditions should be given little or no weight.

Dr. Powers' testimony does however give the Court valuable information in regard to Father's ability to care for his son. Father got a psychological evaluation by Dr. Powers on August 29, 2002. Dr. Powers' report was entered into evidence at trial (L. F. 95-99). Dr. Powers conducted an Intellectual Assessment of Father and he scored in the low average range with an IQ of 81. (L.F. 95-99). Father's GAF (Global Assessment for Functioning) score was 55, which represented that Father suffered from only moderate psychological problems (Tr. 54-56, L.F. 95-99). Dr. Powers noted in his report that Father was able to recognize essential visual details and were clearly in the average range. Father's ability to understand the social implications on the basis of visual cues and his ability to see part-whole relationships in meaningful material were in the low average range. Dr. Powers found that Father's ability to concentrate was good and his short term auditory memory and his ability to form abstract verbal concepts were at the lower end of the average range. Dr. Powers noted that Mr. Warren's facial movements gave the impression of greater cognitive deficits than were indicated by the testing results. *The testing was not indicative of*

significant deficits in any area . While Dr. Powers found that Father had indeed experienced cognitive impairments as the result of his fall those deficits were not severe or incapacitating. Dr. Powers believed that Father's psychological resources were within acceptable limits. ***Dr. Powers found that Father was able to adequately parent if provided guidance and assistance. Dr. Powers also found that Father's visitations with his son were appropriate. Moreover, Dr. Powers found that Father's interest in his son was sincere and that he wanted to play an active role in his son's life. In conclusion, Dr. Powers testified that Father may make minor parenting errors, but with some supervision could carry out parental functions. (L.F.95-99)-Emphasis added.***

Father testified that as of the date of trial he was living with his sister. Father would be left alone in the residence for up to 12 hours (Tr. 81). During those periods Father would clean, do the laundry, and feed the dog (Tr. 82). Father does the grocery shopping buying meats, vegetables, fruit milk and canned goods with no assistance from his sister (Tr. 82). Father would make the decisions as to what food to buy, when to go, and making a list (Tr. 83). As of trial, Father was not seeing a doctor other than for checkups every six months (Tr. 84). Father was further caring for his

sister's disabled husband (now deceased) which required the type of intensive care associated with an infant (Tr. 150-152).

At trial, Father was asked numerous questions about his ability to properly care for Alex. Father's responses were appropriate as evidenced by the following testimony to wit:

Attorney Bryan-What would you do if a child had a fever?

Father-I would take him to a doctor.

Attorney Bryan-What would you do if the child had a fever of say 104?

Father-I would take him to the hospital (Tr. 93)

Attorney Bryan-What would you do if the child had a cut on his hand?

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Attorney Bryan-If the child came into your care right now, where would the child go to school? Do you know?

Father-Yes, He would go to school at Winfield.

Attorney Bryan-How would he get there?

Father-How would he get there? There are buses that pick them up in the trailer court. They stop at each trailer and pick up the child.

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Attorney Bryan-Did you bring anything for the child when you visited with him?

Father-Yes, I did. I always brought Alex food, and I also brought him toys when he was a little bit younger; and, plus, I've brought him toys recently. But I've bought him new blue jeans, new shoes, new shirts, bought him an electric toothbrush and let him take it with him. I just wanted to keep him happy and keep him clothed (Tr. 98-99).

Attorney Bryan-Would you describe—well, when did you start caring for the child?

Father-I started caring for him after he was brought home from the hospital when he was born. And naturally, you know, we had raised him on the proper medicine, on the proper nutrition that he needed, like formula, to help him grow and give him the strength to help him build himself where he could, you know, just function on his own...When he grew up and learning to walk, put him in a walker and then let him walk. And then he got out of the walker and would hold my hands, he wanted to walk, and he'd just say, "Daddy, I want to walk like you." And so I would. Well, he said "Da-da" back then. And he'd—then he would—he would want to hang on to me and hang on to me when I'd try to leave. When I tried to leave, he would just grab ahold of my pants leg. If he was crawling, he would even grab ahold of my shoestrings...(Tr. 100-101)

Attorney Bryan-Do you think you can care for your child?

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Attorney Bryan-You're talking about cooking. What can you cook?

Father-I can –pork chops, macaroni and cheese, potatoes, fried or mashed potatoes, or I can bake potatoes, or hamburgers,

toast, soup. And every kind of food that we enjoy I could cook
(Tr. 109).

As to the fourth prong, the Court found that Father did not suffer from any chemical dependency that prevented him from consistently providing the necessary care, custody and control of A.S.W. (L.F. 106-111).

There is no dispute that due to Father's fall at work that he sustained a head injury. The question is whether that injury renders him unable to care for A.S.W. or poses a risk of harm to A.S.W. *In arguendo*, even if we assume that Father's head injury is a mental illness, unlike neglect, abandonment, abuse, or nonsupport, the mental illness of a parent is not per se harmful to a child." *In the Interest of C.P.B.*, 641 S.W.2d 456, 460 (Mo.App.1982); *In the Interest of D.L.M.*, 31 S.W. 3d 64 (Mo. App. E.D. 2000). ***Termination of parental rights should not be granted on account of mental illness unless it is shown by clear, cogent and convincing evidence that A.S.W. was harmed or was likely to be harmed in the future.*** *Id* (Emphasis added). The focus should be on the ability of Father to care for A.S.W. and his ability to maintain a parental relationship with A.S.W. which would not be harmful to him. ***There was no evidence that A.S.W. was ever harmed by his Father or that Father's condition somehow would endanger***

A.S.W. in the future. In the trial court's own findings, the court stated that there was no evidence that either parent committed any deliberate act that would subject this child to a substantial risk of physical or mental harm, or know or should have known of such an act on the part of the another. Further the trial court stated that Father has indicated an interest in, and commitment to the juvenile (L.F. 106-111). In fact, Father successfully completed a parenting class with high praise from the social worker (L.F. 100-105). Moreover, it was established that when Father visited with his son that he took all appropriate measures including bringing him food and toys. During his visits with A.S.W. the caseworker for the Division of Family Services testified that Father's conduct with A.S.W. during the visits was appropriate, that Father showed concern and love for the child, that Father redirected the child if the child exhibited inappropriate behavior, that Father maintained regular contact with DFS, Father paid child support, and that Father was following the advice of his doctor (Tr. 65-67, 98-99). Further, it was established through detailed evidence that Father, as of the date of trial was not only taking care of himself but was acting as a caregiver to his sister doing the housework, shopping, doing the laundry and preparing well balanced meals (Tr. 81-84).

If there was any question as to Father's ability to care for his son that question is answered by the Juvenile Officer's expert. Dr. Powers ***recommended that Father have visitation with A.S.W. and that said visitation would not put the child in jeopardy (L.F. 95-99).***

It has been held by the U.S. Supreme Court that a parent's right as to the care and management of their child does not evaporate simply because he has not been, or cannot be, a model parent. Santosky v. Kramer, 455 U.S. 745, 753 (1982). In Santosky, The Supreme Court, Justice Blackmun, held that **before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence (Emphasis Added).** Id. at 753-54.

Strict and literal compliance with the statutory requirements is necessary in termination of parental rights cases. In re A.S.O., 52 S.W. 3d 59 (Mo. App. W.D. 2001).

The Missouri Court of Appeals affirmation of the trial court's termination of Father's parental rights is contrary to the mandates set forth in In the Interest of D.L.M. 31 S.W. 3d 64 (Mo. App. E.D. 2000). With any view of the evidence most favorable to the trial court's analysis there did not exist clear, cogent and convincing facts that in any way showed that A.S.W.

was harmed as the result of his Father's condition or that A.S.W. was likely to be harmed in the future. After all, Dr. Powers' ultimate recommendation was that Father could carry out parental functions with supervision and that Father may make *minor parenting errors* (L.F. 95-99). "Minor parenting errors" as forming the basis to terminate Father's parental rights is not justified or contemplated by *RSMo. 452.447.4(3)* or the proclamation made in *In the Interest of D.L.M.* 31 S.W. 3d 64 (Mo. App. E.D. 2000) that there must be clear, cogent and convincing evidence to support a termination of parental rights.

To support its rationale for the affirmation of the trial court, the Missouri Court of Appeals for the Eastern District reasoned the following: *(Although the results of the test administered to Father) did not indicate significant deficits...there were some deficits that raised concerns. Those concerns take on greater importance in view of the history of sexual abuse for which he was incarcerated, and it takes on greater importance in view of the incident in which he showered with his son"* (Page 6 of *Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16 (b)*).

This rationale to justify the termination of Father's parental rights is important for two reasons: 1) It shows that there was not clear, cogent and

convincing evidence that A.S.W. was harmed or was likely to be harmed by any action or inaction of Father contrary to In the Interest of D.L.M. 31 S.W. 3d 64 (Mo. App. E.D. 2000); and 2) That although objective testing indicated no significant deficits in regard to Father's mental condition giving rise to the termination that because of his criminal history the court was going to give the results a different reading thus construing the statute in favor of the Juvenile Officer instead of the natural parent. See In re Adoption of W.B.L., 681 S.W. 2d 452,454 (Mo. banc 1984). Father was not given the benefit of the doubt in this case. The clear, cogent and convincing standard was not applied to Father because of his criminal conviction. This trumps the principles set forth in In the Interest of D.L.M. 31 S.W. 3d 64 (Mo. App. E.D. 2000), and the right of Father under *Mo. Const. art. I, §2 ...that all persons are created equal and are entitled to equal rights and opportunity under the law...*"

The Juvenile Officer having failed to prove his allegations by clear and convincing evidence necessitates a reversal of the trial court and the Missouri Court of Appeals for the Eastern District as to the termination of Father's rights. In the alternative, Appellant requests a new trial so that his fitness to parent may be determined by appropriate professional opinions.

ARGUMENT POINT#2

The Appellant challenges the Judgment and Order of Termination of Father's Parental Rights entered by the Honorable Carol Kennedy Bader on November 19, 2002.

POINT #2- The trial court erred because its Judgment and Order Terminating Parental Rights (as to Father) misapplied Missouri law when it terminated Father's parental rights based on his brain injury because there is no statutory authority for a Court to terminate parental rights based on a physical injury pursuant to RSMo. §211.447.4 (3).

Standard of Review

In a termination of parental rights proceeding, the judgment of the trial court shall be affirmed unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *In the Interest of F.N.M.*, 951 S.W.2d 702, 703 (Mo.App.

E.D.1997); *In the Interest of D.L.M.* 31 S.W. 3d 64 (Mo. App. E.D. 2000).

This court defers to the trial court's assessment of the credibility of the witnesses and examines all facts in the light most favorable to the trial court's judgment. *Id.*

Prior to terminating the rights of a parent, there must be clear, cogent, and convincing evidence that one or more of the grounds set forth in *Mo. Rev. Stat. § 211.447.4 (3) (1998)* exists. *Id.* at 705. Although reunification of the family is the desired outcome of DFS involvement, the primary concern in any termination case is the best interest of the child. *Id.* at 706. Such clear, cogent, and convincing evidence must instantly tilt the scale in the affirmative when weighed against the evidence in opposition and leave the fact finder's mind with an abiding conviction that the evidence is true. *In Re Adoption of W.B.L.*, 681 S.W.2d, 452, 454 (Mo. banc 1984). The statutes are to be strictly construed in favor of the natural parents. *Id.* at 455.

Strict and literal compliance with the statutory requirements is necessary in termination of parental rights cases. *In re A.S.O.*, 52 S.W. 3d 59 (Mo. App. W.D. 2001).

The Juvenile Officer's Petition alleged the following to wit: The child has been under the jurisdiction of the juvenile court for a period of one year or longer and the conditions which led the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, and there is little likelihood that these conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or continuation of the parent-child relationship greatly diminishes the child's

prospects for early integration into a stable and permanent home to wit, ***the father has a significant brain injury which renders him incapable of providing necessary care, custody and control of the juvenile (the remainder of the Count was stricken by stipulation)***-Emphasis added (L.F. 73-75).

There is no statutory authority for the trial court to terminate Father's rights based on his brain injury. The Juvenile Officer proceeded under *Mo. Rev. Stat. §211.447.4 (3)(c)(1998)* which provides for the termination under the following conditions only to wit:"...a mental condition shown to be permanent or such that there is no reasonable likelihood of its reversal and which renders the parent unable to knowingly provide the child with necessary care (emphasis added)."

The Juvenile Officer neither plead nor sought to prove that Father had a ***mental condition*** that rendered him incapable of providing the necessary care to A.S.W. Rather, the Juvenile Officer plead and sought to prove that Father's ***brain injury*** rendered him incapable of providing care. *Mo. Rev. Stat. §211.447.4 (3) (1998)* does not provide for termination of parental rights under physical injury grounds. The court's termination of Father's parental rights under this statutory scheme was a misapplication of Missouri law. As termination may only be predicated on a strict application of

statutory requirements, the trial court's termination of Father's parental rights requires reversal.

CONCLUSION AND RELIEF SOUGHT

The trial court terminated Father's rights to his son A.S.W. in the face of evidence that he loved and was committed to his child. Father's only fault was that he was the victim of a fall at work where he was attempting to provide for his family. Father was the primary caregiver to A.S.W. prior to his accident. Father, the social worker for the State of Missouri, Dr. Powers and Father's mother and sister all agreed that Father could properly care for his son. The only barrier to Father and A.S.W. is the trial court's decision which was not supported by fact or law.

Appellant respectfully requests that as to Father, this Court reverse the Judgment and Order Terminating his Parental Rights entered by the Honorable Carol Kennedy Bader on November 19, 2002 and restore the sole care, custody and control of A.S.W. to Father terminating the jurisdiction of the Juvenile Court and the custody rights of all other interested parties. In the alternative, Appellant respectfully requests that as to Father this Court remand the matter back to the trial court for a new trial so that testimony may be elicited from a medical doctor who specializes in head trauma as to the implications of Father's brain injury on his ability to care for his son.

Respectfully Submitted:

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CERTIFICATE OF COMPLIANCE AND SERVICE

I HEREBY CERTIFY THAT:

1. That the attached brief complies with the limitations contained in the Missouri Rules of Civil Procedure and the Local Rules of the Eastern District of Missouri and contains 7,555 words as determined by Microsoft Word Software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That the Appellant has reviewed the information in Rules 55.03 and 84.06 (b), 83.08 and 84.04 of the Missouri Rules of Civil Procedure and has complied with those Rules; and
4. That a true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed postage prepaid this 26th day of March, 2003 to: Mr. Theodore Allen, Jr., P.O. Box 100, Hillsboro, MO 63050; and Mr. John S. Appelbaum, 4139 Jeffco Blvd., Arnold, MO 63010.

Craig G. Kallen, III #38025

APPENDIX TABLE OF CONTENTS

Order from Missouri Court of Appeals Eastern District	A1-A2
Memorandum Supplementing Order	A3-A9
Mo. Const., art. I §2	A10-A11
Mo. Const. art V, §10	A12
Mo. Rev. Stat. §211.447	A13-A21